UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CSX TRANSPORTATION, INC.,

Plaintiff-Appellant,

v. D.C. Cir. No. 05-5131

ANTHONY A. WILLIAMS, et al.,

Defendants-Appellees.

OPPOSITION BY THE DISTRICT OF COLUMBIA APPELLEES
TO CSX TRANSPORTATION'S EMERGENCY MOTION
FOR INJUNCTION PENDING APPEAL OR SUMMARY REVERSAL

Introduction and Overview

After careful review of a voluminous record and multiple legal issues, the district court issued a logical, comprehensive, and persuasive 76 page memorandum opinion denying CSX Transportation's motion to enjoin preliminarily the District of Columbia's enforcement of the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005, which seeks to prevent a terrorist attack on hazardous, lethal cargo being shipped by rail through the District of Columbia. After a detailed discussion of each of CSX's legal claims, the court concluded that CSX's claims were not "trivial" but that, on the current record, plaintiff is not likely to succeed on the merits of those claims. Mem. Op. 62-63. The district court correctly ruled that presumption principles do not preclude the District from exercising its police powers to reduce the risk of terrorist attacks, given the failure of the federal government to provide protections under its regulatory powers.

As to irreparable harm and the competing interests of the parties and the public, the court concluded that "the balance of equities clearly favors the District of Columbia and its residents,"

especially considering that the railroad made "only vague predications of increased costs and logistical burdens" of re-routing less than one percent of its total rail traffic in order to comply with the law, and those burdens "pale in comparison to the potential devastation predicted to occur in the event of a terrorist attack on a railcar transporting hazmats in the Nation's Capital." Mem. Op. 75. This is especially so considering that CSX has not applied (as of early this morning) to the D.C. Department of Transportation for a permit to ship haxmats (or even its empty hazmat rail cars) through the District under emergency regulations authorizing such a permit if the railroad establishes that there is no practical alternative route. 52 D.C. Register 3446 (Apr. 1, 2005).

CSX now asks this Court to issue the injunction denied by the district court, but fails to show how the district court abused its discretion or otherwise erred as a matter of law in denying injunctive relief. It appears that the United States is not joining CSX's motion, although the United States supported CSX's position below. The Court should apply the same balancing test applied by the district court, and reach the same conclusion that an injunction is not warranted here.

The Terrorism Prevention Act took effect February 15, 2005, but the District of Columbia voluntarily stayed enforcement of the law until April 20, 2005, to enable the district court to address the preliminary injunction motion. Thus, CSXT, has already had more than a month in which it avoided compliance with the law and continued to put the District, its citizens and visitors at a unique risk. It is time for CSXT to comply with the law. CSX has had weeks to plan its alternative routes.

The D.C. Council passed the Terrorism Prevention Emergency Act as a necessary step to eliminate the substantial and credible threat to citizens, workers and visitors of a terrorist attack on ultra-hazardous materials (hazmats) transported by rail in proximity to the U.S. Capitol. There is no question that the federal government has power to issue regulations effectively addressing this

threat, or to preempt the District from doing so, but it has not done so. Accordingly, the District acted in a prudent and measured manner by exercising the traditional police power of the states in our federal system.

The risk that the District seeks to avoid here is the risk of intentional, terrorist attack by the targeting of regular shipments of hazardous materials that pass within blocks of the U.S. Capitol, the Supreme Court, and many other important federal buildings in a highly populated area. Federal regulations do not address this risk. Because the District of Columbia is under a *unique* risk of such an attack, the rerouting of the covered materials here to other areas would effectively *eliminate* that risk, not shift it elsewhere. Other jurisdictions do not face the magnitude or type of risk faced by the District here, and could not copy the unique legislation adopted by the District.

CSX cites common sense as a reason to grant injunctive relief. Emergency Motion at 2. Common sense dictates to the contrary. If denied an injunction, by its own account, CSXT must reroute, at most, less than one percent of its total national rail traffic (0.16%) and less than 2.3% of its total national hazmat traffic (and the limited discovery held below reflects the numbers are actually smaller than that). Mem. Op. at 65. Common sense dictates that such a modest adjustment to CSX's total train operations is not unwarranted to diminish the catastrophic consequences the District would face in a terrorist attack on a train carrying hazmats. This is a disproportionate risk the District of Columbia faces as a high priority target for terrorists because of its status as the "home to all three branches of the federal government, as well as numerous federal buildings, foreign embassies, multinational institutions, and national monuments of iconic significance[.]" Mem. Op. at 70, quoting Maryland Three Airports: Enhanced Security Procedures for Operations at certain Airports in the Washington, D.C., Metropolitan Flight

Restricted Zone, 70 Fed. Reg. 7150, 7152-53 (Feb. 10, 2005).

Discussion

Although this Court has the authority to grant an injunction pending appeal, even when the district court has denied such relief, such an injunction barring enforcement of a statute would be an extraordinary remedy not warranted here considering the thoroughness of the district court's consideration of the issues. *Wisconsin Right To Life, Inc. v. FederalElection Commission,* 125 S.Ct. 2 (2004); *Public Utilities Comm. v. Capital Transit Co.*, 214 F.2d 242 (D.C. Cir. 1954). In general, a "preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton,* 391 F.3d 251, 258 (D.C.Cir. 2004). To prevail, the party seeking an injunction must make a strong showing in four areas: (1) that it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the relief; (3) the harm to other parties if relief is granted; and (4) where the public interest lies. *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958); D.C. Cir. R. 8; D.C.Circuit Handbook of Practice and Internal Procedures 33 (2002). None of the factors for granting an injunction is present here.

The Court reviews the grant of a preliminary injunction for abuse of discretion, although the district court's legal conclusions are subject to "essentially *de novo* review." *Cobell v. Norton,* 391 F.3d 251, 256 (D.C.Cir. 2004), citing *City of Las vegas v. Lujan*, 891 F.2d 927, 931 (D.C. Cir. 1989). Any findings of fact are reviewed for clear error. *Id.*

1. Liklihood of success on the merits. In large part, the plaintiff's emergency motion and the district court's memorandum opinion are ships passing in the night. CSX reiterates the

arguments and rhetoric it presented below with, on most issues, only cursory discussion of how the District Court erred by rejecting those arguments and denying injunctive relief. Neither the Commerce Clause nor the federal statutory scheme governing interstate rail shipments preempts the District Act. The Commerce Clause does not require the District to sit idly by in the face of real and acute security threats unique to the District that the federal government has not addressed. It can exercise its police power to deal with the threats. The federal statutes cited by CSX each include provisions authorizing states and the District to regulate under these circumstances.

The district court comprehensively addressed each of CSX's legal arguments in its persuasive 76 page memorandum opinion and disposed of each claim after thoughtful discussion of the relevant statutory language and applicable caselaw. The District of Columbia will not burden the court by reiterating the district court's reasoning here, but incorporates and relies on that opinion here, noting that CSX appears to have abandoned the Home Rule Act argument in its emergency motion. The District highlights portions of the district court's decision in response to specific arguments emphasized by CSX in its emergency motion.

As its lead argument for an injunction pending appeal, CSX argues that the District Act is preempted by a provision of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501(b), and the district court is bound in this regard by the decision of the Surface Transportation Board (STB) on this issue. Motion at 9. The district court rejected the notion that the ICC Termination Act preempted the D.C. Act and roundly rejected the notion that it was bound by the STB decision in this regard.

The district court's reasoning is persuasive here. The court found CSX's argument that the ICC Termination Act precluded all state efforts to regulate rail transportation, even in the

exercise of local police powers, flawed because CSX interpreted the ICC Termination Act in a contextual vacuum apart from the statutory framework and the "well-established federal-state rail safety framework" of federal law. Mem. Op. at 32-33. As the district court explained:

> The District Act is clearly aimed at rail safety; it requires no changes to the infrastructure of the interstate railroad system, nor does it directly regulate the physical routing of trains. (CSXT trains may continue traveling through the District as long as they do not carry the banned hazmats.) Plaintiff's expansive interpretation of ICCTA preemption in this case would undermine the longstanding partnership between states and the federal government in the areas of rail safety and security, and would ignore Congress' intent as expressed through the [Federal Railroad Safety Act], the [hazardous materials Transportation Act], and the Homeland Security Act. [Citing cases.} Accordingly, the Court finds that the ICCTA does not independently preempt the District Act.

Mem. Op. at 33-34.

Rather than rebut this reasoning, CSX asserts that the district court lacked authority to second guess a declaratory order of the STB expressing the Board's view that the District Act "unreasonably burdens interstate commerce" and is "preempted" by the ICC Termination Act. But the district court also aptly rejected this argument. Mem. Op. at 39-46. First, as the STB itself acknowledged, the STB had no power to invalidate the D.C. Act. See, STB order at 5-6. STB had no "veto power over the District of Columbia's – or any other state or local government's – legislative judgments regarding the safety and security of its citizens." Mem. Op. at 41. Nor would this Court have jurisdiction to review the STB order since the order does not arise from an agency action over which this Court would have appellate jurisdiction, but is merely an advisory ruling of the Board's view that the District Act is preempted. Mem. op. at 41-42 (citing cases).

In any event, the STB order, even if issued in a valid enforcement action, did not deprive the court of its authority under Article III of the Constitution, to exercise its authority to

independently interpret the law, rather than rubber stamp an executive branch agency's interpretation of the law. Mem. Op. 43. The court found that the STB decision violated positions that the STB had taken in other cases, was clearly erroneous, and not worthy of enforcement. Mem. Op. 45.

In addition, STB's decision is not a final decision because the District's petition for reconsideration is pending there. In that petition, D.C. argued, in part :

> The Court of Appeals of the District of Columbia Circuit has rejected an STB decision that "ignored" the interests of one party, and accepted "hook, line, and sinker" the interests of the opposing parties. *New York Cross Harbor RR v. Surface Transp. Board*, 374 F.3d 1177, 1184 (STB decision vacated and remanded because of Board's "failure to balance the competing interests").
>
> Here, the Decision almost completely ignores the substantial interests of the District in protecting its citizens from the acknowledged threat of terrorism, instead appearing to adopt unquestioningly the position of the railroad industry and the United States Department of Transportation ("USDOT"). The Decision discusses almost exclusively the concerns of the railroad industry, the shipping industry, the "producers and users of hazardous materials," and three individual members of Congress. Decision at 1 & nn.2–4.
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> There is almost no reasoned discussion of the District's police-power argument. Worse, the Decision purports to discuss only a legal issue, and "neither discovery nor further evidentiary proceedings are necessary." *Id.* at 6. Notwithstanding this conclusion, the Decision repeatedly discusses how the District's Terrorism Prevention Act ("TPA") "unreasonably burdens" interstate commerce. *Id*. at 10, 11. This suggests either that all non-federal laws are preempted that have *any* effect on interstate commerce (which is *not* the test under the law), or that the Board considered the effects of the law as alleged by CSXT, without allowing the District to present its own evidence or counter CSXT's. Either conclusion is legal error. In order for the Board to rule on the "reasonableness" of the District legislation's purported impact on interstate commerce, it must *a priori* consider the facts alleged in support of that conclusion. Otherwise, the Board is attempting to interpret the TPA in a vacuum.
>
> The facts elucidated in the limited record at the U.S. District Court reveal that, at most, CSXT has shown only a *de minimis* burden on its own operations, and virtually none at all on interstate commerce. To the extent the Board concluded otherwise, the District asserts error.

Petition for Reconsideration at 1-3, footnote omitted, full New York Cross Harbor citation inserted. CSX fails to rebut the district court's conclusions that the STB order is not worthy of

judicial imprimatur. The STB order does not justify an injunction here.

There is no merit to CSX's argument that it cannot comply with both the STB ruling and the District Act, and therefore will be considered "as a lawbreaker." Motion at 2. The STB ruling did not order CSX to do anything. CSX can comply fully with the district court decision and the District Act without running afoul of anything the STB ordered.

At pages 5 and 12 of its motion, as part of its preemption argument, CSXT emphasizes that a United States regulation required it to develop a "plan" regarding the security of hazardous materials by rail, but does not reveal the details of the plan due to the "security-sensitive, highly confidential information protected by federal law." The district court roundly rejected that such a plan could preempt the District Act as a matter of law, especially considering that, at the hearing below, no one in the courtroom, not even attorneys for the United States and CSX, had ever seen the plan much less submitted it to the court for *in camera* review. Mem. Op. 29. Further, the court noted that there is no evidence in the record that the United States government "ever rejected or even conditioned the substantive elements in a carrier's plan, [or that] there are any penalties or sanctions for noncompliance." CSXT fails to rebut the district court's conclusion that its plan is of no moment. The district court did not conclude that federal regulations must be "highly detailed" to be preemptive, only that the District Act does not conflict with federal policy. Mem. Op. 30-31. In any event, the district court noted the January 2005 sworn Congressional testimony of Richard Falkenrath, the former Deputy Homeland Security Advisor to the President that the federal government has "essentially done nothing" in the area. Mem. Op. at 74-75.

On the Commerce Clause issue, the District notes that the Supreme Court has permitted states to regulate railroads in furtherance of public safety, even though the regulations

"incidentally" embrace interstate transportation within their operation. *Smith v. Alabama*, 124 U.S. 465 (1888) (it was within police power of state to require locomotive engineers employed in interstate commerce to be examined and licensed and to enforce this requirement until Congress should decree otherwise); *New York, N.H., & H. Co. v. New York*, 165 U.S. 628 (1897) (upholding statute that forbade the heating of passenger cars by stoves); *Chicago, R.I. & Pac. Ry. Co. v. Arkansas*, 219 U.S. 453 (1911) (statute requiring three brakemen on trains over twenty-five cars); *Atchison T. & S.F. Ry. Co. v. Railroad Comm.*, 283 U.S. 380 (1931) (statute requiring electric headlights of a specified minimum capacity).

The district court established that CSX is not likely to prevail on the merits of its claim. CSX has failed to rebut the district court's reasoning in this regard so as to justify an injunction pending appeal.

2. Irreparable harm. Plaintiff's maximum "burden" amounts to the potential rerouting of 0.16% of its total national rail traffic, or 2.3% of its total national hazardous-material traffic, by number of cars, s*ee* Amended Complaint ¶¶ 2, 85, although discovery and the deposition of plaintiff's representative revealed the actual numbers might be even lower than those alleged in the complaint. Mem. Op. 65. Further, as noted above, CSX has not applied for any permits under the emergency regulations, or attempted to establish before the District's Department of Transportation that such a permit is warranted because there is no practical alternative route. 52 D.C. Register 3446 (Apr. 1, 2005). Arguments that other rail carriers might deny access to their lines or that rerouting empty cars is cost prohibitive should be developed before the agency in an application for a permit, not in a request for an injunction since the Act has a mechanism for granting permits.[1]

[1] Robert Utiger, counsel for the District in this matter below, has discussed the issue of "empties" with Peter Shudtz, in CSXT's general counsel's office. "Empties" were included in

CSX's harm is chiefly economic and administrative in nature and does not warrant an injunction. As to the economic harm, there is no indication that CSX cannot pass on any added financial burden to the shippers who deal in hazardous materials.

3. Balance of Harms. CSX blithely predicts that the District will "suffer little corresponding harm" if the Court grants an injunction. Motion at 18. This prediction is contrary to the views of the District's elected mayor and legislators. The district court wrote that it sincerely hoped the plaintiff was right, but was "unwilling to take the gamble." Mem. Op. at 67. Balanced against CSX's asserted harm "is the uncontested and basically unquantifiable risk of a major terrorist attack resulting in mass casualties." Mem. Op. at 66. Federal studies cited by the court that were conducted in 2004 reflect that an attack on a chlorine gas facility in an urban area could result in 17,500 deaths, 10,000 severe injuries, and 100,000 hospitalizations. Mem. Op. 66-67. A Naval Research Institute study found that an attack on a chlorine rail car during a political event or celebration on the National Mall could kill or seriously injure up to 100,000 people in the first half hour. *Id.* "It would be irresponsible, at best, for the Court to enjoin the District Act,

(..continued)
the legislation solely because of problems in enforcement if empty cars, labeled as full, were not regulated. Mr. Utiger informed Mr. Shudtz that the District would be receptive to a proposal from CSXT that would allow "empties" to transit the District subject to a provision that CSXT provide proof that the cars are empty, such as a bill of lading, upon demand of the District. It is the District's position that a permit could issue under these circumstances.

potentially placing tens of thousands of lives at risk, before plaintiff has satisfied its burden of at least producing competent evidence demonstrating its entitlement to relief on the merits." Mem. Op. 67. This court should reach the same conclusion.

4. Public Interest. The minimal added cost and delay associated with routing around the Capitol Exclusion Zone are not disproportionate when balanced against the public interest in avoiding a catastrophic terrorist attack in a densely populated area that has already been, and remains, a high-risk terrorist target. 50 Fed. Reg. at 7152–53.

CSX asserts that the longer transportation time for hazmats in miles and time will "increase the inherent risk of transporting hazardous materials," Motion at 6 and subject other jurisdictions to potential harm, and that the District is simply trying to shift the inherent safety risk from itself to other jurisdictions, especially "similarly situated jurisdictions." Motion at 3, 18. The district court's opinion effectively debunks this argument. Mem. Op. at 6870. Re-routing the trains will shift the risk of rare rail accidents to other jurisdictions but will greatly decrease the risk of a terrorist attack on the rail cars, which depends on likely targets of terrorist attacks. The district court concluded that "routing trains out of high-risk areas and through lower risk areas, the government would not be simply 'shifting the risk,' but would actually be reducing the aggregate risk faced by the population as a whole." Mem. Op. 69. "Although the District of Columbia is not alone in confronting the threat of terrorism, it cannot seriously be contested that the District faces disproportionate risks." *Id.*

When passing the District Act, the Council of the District of Columbia concluded, after extensive consideration, public hearings and testimony from a number of federal government witnesses, that the ongoing threat of terrorism in the vicinity of the Capitol constituted an emergency which "requires an urgent response that recognizes and addresses the unique status of this area in American politics and history, and the risk of terrorism that results from this status." Terrorism Prevention Act,

§ 2(2) (February 1, 2005). The Council's heightened concern about terrorism in this area is well-founded. According to the 9/11 Commission, the objective of the Al Qaeda pilot at the controls of United Flight 93, which crashed in Shanksville, Pennsylvania on September 11, 2001, despite the heroic efforts of its passengers, was "to crash his airliner into symbols of the American Republic, the Capitol or the White House."[2] The Washington area already has a facility—Reagan National Airport—subject to unique security provisions that recognize the status and special situation of the nation's capitol. *See, e.g.*, 50 Fed. Reg. 7150 at 7153 (Feb. 10, 2005) ("flight restricted zone" centered on Reagan National Airport subject to more stringent security measures). The balance of equities favors the District of Columbia and its residents.

Accordingly, for all these reasons and those expressed so compellingly by the district court, CSX Transportation has established no entitlement to an injunction here. The Court should deny the motion for an injunction pending appeal.

Finally, the Court should deny summary reversal of the order denying an injunction because this case is not appropriate for summary disposition under *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam) and *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). The District of Columbia believes that the district court's compelling and persuasive decision denying injunctive relief is readily affirmable, but not on a summary basis. The assorted novel and complex issues involving the interplay of several different federal statutes, the Commerce Clause, and the District's Home Rule Act, and a 76 page district court opinion, are not appropriately reviewed on a summary basis, especially if the Court is to issue a published decision on these issues.

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[2] Final Report of the National Commission on Terrorist Attacks Upon the United States at 14 (Authorized Ed.).

The Court should also deny CSX's request, Motion at 20, to order the entry of summary judgment in CSX's favor. This Court has no jurisdiction over the district court's interlocutory decision denying summary judgment, and therefore no authority to order that summary judgment be entered in CSXT's favor regardless of CSXT's assessment that there are no material disputed facts precluding summary judgment. Motion at 19-20. See, 28 USC §§ 1291-1292 (Court of Appeals has jurisdiction over final judgments of district courts and interlocutory decisions granting or refusing injunctions).

Conclusion

The Court should deny CSX Transportation's emergency motion.

Respectfully submitted,

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Certificate of Counsel

The undersigned hereby certifies that copies of the foregoing Opposition by the District of Columbia to Emergency Motion for an Injunction Pending Appeal and for Summary Reversal were delivered by facsimile, electronic mail, and by U.S. Mail, postage prepaid, this 19th day of April, 2005, to:

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